No. 9020

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED. KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY, ERNEST F. GANAHL, FRANK BAUM and JOSEPHINE BAUM, husband and wife,

Appellants,

vs.

ANAHEIM FIRST NATIONAL BANK, a national banking corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

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MISCELLANEOUS.

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APPELLANTS' REPLY BRIEF.

Reading the somewhat technical statements contained in appellee's brief, commencing at the first and ending with the conclusion thereof, on page 50, we find such a mixture of surmise, conjecture, statements of matters and references to exhibits not in the record, and conclusions of the writers not supported by the record, and references to matters which have no connection with, or bearing upon, the issues involved in this appeal, that it will be difficult

to confine ourselves to a reasonably short reply which would not be onerous to this Honorable Court. We shall, therefore, confine ourselves to a brief rebuttal of the points which appellee attempts to make in the reply brief.

The record discloses that upon this appeal appellants have based their respective claims against the bank upon the agreement with the bank. The record shows:

(a) That on June 18, 1931 the directors of the said bank held a meeting whereat it was agreed that certain of said directors should act as a committee to collect the sum of one hundred and seventy-five dollars per share from stockholders, to be used to purchase the depreciation in the bond account of the bank;

(b) That in compliance with the action of the board of directors at the meeting held on June 18, 1931, the appellants, and certain other stockholders, subscribed the required amount of money at one hundred and seventy-five dollars per share, to purchase said bond depreciation.

(c) That on the 17th day of July, 1931, a meeting of the board of directors of said bank was held, and the amounts so subscribed by the stockholders were allocated to the purpose of taking up five notes in the amount of six thousand dollars each, formerly placed in the bank's assets by certain stockholders on account of bond depreciation, and that the balance was to be applied directly against the bond depreciation, thus reducing that depreciation by one hundred ten thousand, six hundred and fifty dollars;

(d) That by the agreement entered into, in compliance with the recommendation of the directors at the meeting held on June 18, 1931, the intent and agreement of the subscribing stockholders was that

interest received from the bonds equalling the amount of depreciation purchased be set aside for the use of the subscribing stockholders, and that an appraisal of the bond account was to be made each six months, when any decrease in the depreciation (if any) should be divided *pro rata* among the subscribing stockholders;

(e) That the recommendation, agreement and disposal of the money subscribed, was at the instance of R. Foster Lamm, the then bank examiner, duly appointed by the controller of the currency;

(f) That on August 20, 1931, after the subscriptions had been made and the funds disposed of, the board of directors of the bank were notified by the deputy controller of the currency that their subscriptions should be made unconditionally, and without expectation of reimbursement;

(g) That the said bank examiner, R. Foster Lamm, informed the said directors prior to the time when said subscriptions were made that by entering into such an agreement they would be buying the depreciation in the bond account, and that the *same procedure had been followed prior to that time, namely, in 1929, by First National Bank of Huntington Beach, California;*

(h) That the controller of the currency at no time disapproved of the procedure followed by the First National Bank of Huntington Beach, California;

(i) That the controller of the currency did not disapprove the repayment to the stockholders of the First National Bank of Anaheim, California, of the sum of thirty thousand dollars, subscribed by them in compliance with the resolution passed at the meeting of its board of directors on the 29th day of May, 1930.

New Rules of Civil Procedure Are Applicable to This Appeal.

Rule 86 of the New Rules of Civil Procedure follows, in substance, Equity Rule 81 and makes the new rules applicable to all cases wherein appeal was taken subsequent to September 1, 1938, as well as all further proceedings in appeals pending, *except* when their application in a particular action would not be feasible or would work injustice.

Statement of Case.

Appellants do not contend that the transcript of record contains all of the evidence adduced at the trial, as to do so would be contrary to the rules of this court, but in our opinion it contains the narrative of *all the evidence as required* by the *rules*. We invite attention to the fact that the appellee had its opportunity under Rule 75 (a), to serve and file a designation of additional portions of the record, proceedings and evidence to be included, if he so desired.

We further invite the attention of this court to the fact that the reporter's transcript of testimony and proceedings on trial is on file in the District Court and may be brought up if, in the opinion of this Honorable Court, it is considered necessary. We do contend, however, that the transcript of record in this case contains all the portions of the record, proceedings and evidence material to the questions involved in this case.

We are at a loss to understand where the appellee received the information in this case that the only time the plan for purchase of a bond depreciation was used was in the case of the First National Bank of Anaheim and in

connection with the First National Bank of Huntington Beach, as stated on page 5 of the reply brief. This statement is not supported by anything which we have found either in the reporter's transcript or in the transcript of record.

We direct this Honorable Court's attention to the fact that, although R. Foster Lamm testified that he had not received the approval of the controller of the currency to the said plan, he further testified that the controller *had never disapproved said plan.* In fact, he testified that he set the plan forth in connection with the First National Bank of Huntington Beach, California, in the year 1929, and asked for their approval or disapproval, but that he never received an answer from the controller's office. [Tr. p. 105.] Since the controller's office knew that such a plan had been put into effect and never disapproved it, it is to be taken that the plan was stamped with the controller's approval.

The appellee contends, on page 6 of the reply brief, that there was notification and instruction by the Controller to the board of directors that subscriptions of that nature were to be viewed as voluntary contributions. We insist that this is not true. No place in the transcript of record has such appeared to be the fact. True it is, as we set forth in our opening brief, page 24, that he advised the directors that "contributions made to restore capital *should* be made unconditionally and without the the expectation of reimbursement". This, if Your Honors please, is not an instruction.

We must take issue with the appellee upon the statement appearing on page 7 of the reply brief that the approval of bank examiner Waldron is a conclusion based

merely on a statement by Dolan, the president of the bank, that "Waldron seemed to think that this was O. K." The testimony of Mr. Dolan on that point is as follows:

> "* * * I think that later on, after the money had been put up, Mr. Waldron was the successor of Mr. Lamm in our territory and I told him what we had done; and *the records show that Mr. Waldron approved our action.*" [Tr. p. 107.]

Appellee in the quotation from Mr. Dolan's testimony, as given above, fails to set forth the complete testimony of Mr. Dolan appearing in the transcript of record. We therefore quote the true testimony of Mr. Dolan:

> "I told him that Mr. Lamm had suggested that the directors and some of the stockholders purchase the bond depreciation and if the bonds appreciated, why, we were to be able to get our money back; and Mr. Waldron seemed to think that that was O. K. He said—
>
> Q. Not what he seemed to think. What did he say? A. He said he did not see why it would not work out all right; *and he said to go ahead,* and on the—I think it was June 22nd, I wrote the Controller of the Currency to that effect." [Tr. p. 107.]

Contrary to the statement of appellee (Resp. Br. p. 9), the appellants have made no pretensions throughout their opening brief. We believe this Honorable Court to be well able to distinguish the real issues before the trial court, and can, therefore, see no reason to enter into a lengthy argument regarding the same. However, it is certain both from the transcript of record and the reporter's transcript that the appellee has no grounds what-

ever for its statement that part of that issue was "whether or not *such an agreement could legally be made in the face of the prior, concurrent and subsequent warnings of the controller of the currency to the bank* that payments made to repair impaired capital must be considered as voluntary and unconditional contributions. * * *" (Resp. Br. p. 9). As the appellants stated in their opening brief the controller of the currency at no time advised them, in regard to this transaction, that such payments must be considered as voluntary and unconditional contributions. At best, the controller's notification to the board of directors of the bank was merely that they *should* be made unconditionally and voluntarily, and that advice was subsequent to the transaction. At no place throughout the transcript of record or reporter's transcript is it shown that there was any *concurrent* advice from the controller of the currency to the board of directors on the question. We cannot stress too greatly the fact that the prior advice as to these matters was addressed to the board of directors in regard to a totally different transaction, one year prior to the time that the agreement involved in this transaction was entered into, and at no time has the controller complained of the fact that the very contributions made at that time were in fact repaid. [Tr. p. 120.]

On page 10 of its brief the appellee seeks to lightly dismiss the case of *Yazoo State Bank v. Kimbrough*, 127 So. 265, as being no authority for appellants' statement that agreements such as the agreement entered into in this case to repair impaired capital of a national bank are valid. However, there is no pretension of explaining why such a statement is made, so we shall pass over that contention for the time being.

Appellee, apparently, disregards the statement of the controller of the currency contained in his letter of July 2, 1930, in regard to a different transaction (Defendant's Exhibit "F,") that "* * * or *purchase for cash of the assets estimated by the examiner as losses.*" The above quotation is one of the ways set forth by the controller of the currency for the impairment of capital of a national bank.

Appellee makes the broad statement that the position of the stockholders is no different from the position of the board of directors. Quoting from the syllabus of one of the cases which they, themselves, cite, *i. e., Utley v. Clarke,* 16 Fed. Supp. 435, we invite Your Honors' attention to the following:

> "3. Evidence: Vice president and director making loan to remove impairment of bank's capital, as regards right to recover on bank's insolvency, was not chargeable with knowledge of deposit of his check for same amount to credit of surplus funds of bank, *nor of letters written by president to Controller of Currency regarding transaction.*"

Thus, it is evident that the stockholders are not bound by what their directors do in the management of the bank.

Appellee attempts to gloss over appellants' point IV, lightly. While it states that the case of *Skinner v. Rich,* 55 Pac. (2d) 1146, "is hardly an authority for Appellants' contention," and goes into an analysis of certain of the facts of that case and quotes portions thereof, a mere reading of the case will show that it is in fact definitely in point with the case at bar.

The same is true as to appellee's contention in regard to the case of *Eisele v. First National Bank,* 137 Atl. 827, on page 14 of reply brief.

In regard to the various statements and denials of the appellee appearing on pages 15 and 16 of its brief, appellants feel that the evidence itself, which is set forth in the transcript of record, is the best answer. We do not see how the appellee can deny that the agreement was entered into in the face of the agreement itself, as embodied in plaintiff's Exhibits 1, 2 and 4 [Tr. pp. 118-121, incl.].

In the first 16 pages of his brief, appellee has repeatedly contended that only a part of the evidence has been brought up on appeal, and repeatedly implies that the evidence brought up on appeal is only such as appellants believe will lend support to their contentions. This is false. A reading of the reporter's transcript of the evidence will show that the transcript of record is a complete synopsis of the case, and if this Honorable Court deems it necessary, we shall respectfully request permission to prove the truth of this statement by having the reporter's transcript of the evidence made a supplemental part of the transcript of record.

The appellee concedes that directors of a national bank can make a valid contract with it in the absence of fraud, bad faith, or undue influence (Resp. Br. p. 17). A reading of the transcript of record will show that this entire case was based upon just that contention on the part of the appellants.

In regard to the cases cited by appellee on pages 17 to 21, incl., of the reply brief, we invite this Honorable

Court's attention to the fact that not one of these cases is in point with the instant case.

The appellee quotes a short portion of the opinion from the case of *Dudley v. Citizens' State Bank,* 103 Cal. App. 433, as a reason why that case should not be applicable to the instant case. Counsel for appellee has italicized a portion thereof. We submit that the whole case, and not a mere few sentences taken from it, show the true significance of that decision. The circumstances in the instant case do not show a voluntary payment, or a payment under circumstances where the law implies a gift, but, on the contrary, show a loan made by certain directors and stockholders of the bank under a valid agreement with the bank, setting forth the means by which they were to receive the return of the money thus advanced for the benefit and use of the bank.

Appellee, on pages 22 and 23 of reply brief, suggests that an analysis of the cases cited by appellants in their opening brief shows facts inconsistent with those of the case before this court. We cannot agree with appellee that such is the case. We, therefore, invite an analysis of each and every one of the cases cited by the appellants in their opening brief which, we contend, are strictly in point, and closely akin to the circumstances and facts of the case at bar.

Appellants fail to see where the cases of *Tyler v. Reynolds,* 197 S. E. 735; *Delano v. Butler, Receiver of Pacific National Bank,* 118 U. S. 634, and *Coast National Bank v. Bloom,* 174 Atlantic 576 (N. J.), are in any way applicable to the set of facts and circumstances existing in this case on appeal, or how they are in point.

On page 26 of the reply brief, appellee again urges a so-called warning to the subscribing directors and stockholders by controller's office that payments to repair capital must be voluntary and unconditional, without obligation of repayment. We submit that the transcript of evidence and the record in this case will show this statement to be false and we see no use in repetition of argument on that point.

That same argument is used on page 27 of the reply brief cleverly implying that such a "warning" as they contend was given would supersede any instructions of the bank examiner. But, it is to be remembered that the instructions of the bank examiner were given in regard to this transaction alone, and that the communications from the controller's office applied only to a prior and different transaction in the one case, and, otherwise, were given subsequent to the time the subscriptions were made in this transaction.

In regard to the case of *Anderson v. Akers*, 7 Fed. Supp. 924, and the quotation appearing therefrom on page 936 (Resp. Br. p. 27), we submit that this case can have no bearing whatever upon the case at bar for the reason that in our case, as has been definitely shown, the directors had the power to enter into a valid agreement, while the *Anderson* case, as is shown by the quotation itself, was one in which the acts were *ultra vires*. And the very portion of the case quoted shows that the decision was predicated upon the fact that the acts were *ultra vires*, as the justices on that case say: "* * * and could not make proper what was, as a matter of law *ultra vires*, and therefore unlawful, * * *."

Bernard v. Emmett State Bank, 257 Pac. 949, is a case revolving around the matter of assessments and has nothing to do with any agreement such as in involved in this case.

In regard to appellee's remarks anent this case being one in equity or one in law, we respectfully insist that under Rule 18, subsection (b) in a single action a party should be accorded all the relief to which he is entitled, regardless of whether it is legal, or equitable, or both.

Counsel for appellee, on page 43 of the reply brief, apparently take it upon themselves to represent the general creditors of the bank. Since the general creditors (if any there be) were neither concerned with this case in the District Court, nor appear as parties in the case on appeal, we do not see any reason to enter into a discussion of the matter.

Having read the various cases cited and quoted from by appellee, we fail entirely to see how any one of them has a bearing on the instant case. Not one of those cases involves an agreement such as existed in the present case and in none of them did such a set of facts and circumstances exist as in the case at bar. Some of the cases are so far from being in point that we can see no reason for their citation. As an instance of this we draw to the court's attention the fact that in the case of *U. S. v. Stephanides, et al.,* 47 Fed. (2d) 554 (Resp. Br. p. 49), there was no bill of exceptions settled and allowed. As said by the court in that case: "Consequently, the only

question open for our consideration is whether the judgment could properly be rendered under the pleadings."

Wherein in the reply brief has appellee contravened the logic of the various cases cited by appellants in their opening brief or shown that those same cases are not in point? In each instance they have glossed over the case with the mere comment that it is not in point. In the case of *Yazoo State Bank v. Kimbrough,* 127 So. 265, 157 Pac. 149, appellee sets forth a small portion to bear out a point. However, they fail to set out the entire portion bearing upon that point. Lest, at first glance, it would seem to favor the contention of the appellee, the whole portion from which the quotation was taken follows:

> "The three cases relied upon by the appellants and cited above, held that 'when the directors of a bank in response to a demand of the State Bank Examiner, make good an impairment of the capital stock, sign and discount their personal note and deposit the proceeds to the credit of the bank, the transaction is a donation or a gift to the bank; *but, on its facts the case at bar is distinguishable from these cases. The arrangement consummated in this case was, in effect, a sale of the notes to these directors for cash at the face* value thereof. In so far as the effect of the transaction on the bank and its assets is concerned, it was the same as if the makers of the notes in question had paid them in full to the bank. The bank assumed no obligation to make good any deficit or loss that the directors might sustain as a result of the failure to collect the notes. It merely received in cash

> the full face value of securities of doubtful value; and this was all it could have demanded or received from the makers of the notes. The directors who took over these doubtful securities assumed all of the risk of realizing thereon, and by this transaction there was no possibility of benefit to them or loss to the bank, *and there can be no good reason why they should not receive the proceeds of the notes so, in effect, purchased by them.*"

A reading of that case will demonstrate its applicability to his case, and the same is true of each and every other case cited in our opening brief.

If the agreement was in contravention of law as appellee contends then appellants have a right of recovery of the respective amounts of their subscriptions since there was a total failure of consideration.

It is a firmly established legal principle that a contract made in contravention of law, whether it be of statute, ordinance, or otherwise, or the performance of which requires the violation of such laws, is illegal and such a contract is void, whether the parties knew the law or not. The appellee denies that appellants ever entered into the agreement with the bank. (Resp. Br. p. 15.) Plaintiff's Exhibit 4 [Tr. pp. 120-121, incl.] shows that it was their intent to do so and thought that they had. The bank accepted their subscriptions and the use and retention thereof. Very well then—if there was no such agreement because it would be in violation of law, or lacked one of the essential elements of a valid contract, that is a lawful

object, then the appellants have a right to recover the amounts of their respective subscriptions since such a contract would be void *ab initio.*

Industrial D. & L. Co. v. Goldschmidt 56 Cal. App. 507, 509;

6 *R. C. L.* at pp. 692, 694, 699;

Texas Co. v. Bank of America, 5 Cal. (2d) 35;

Wood v. Imperial Irrigation Dist., 216 Cal. 748;

Silverthorn v. Percey, 120 Cal. App. 83;

Construction Co. v. Fed. L. V. Ins. Co., 5 Cal. App. (2d) 16.

Multiplying authorities is useless.

Conclusion.

We respectfully request this court to reverse the judgment and decree of the District Court. We can see nothing in appellee's brief but an attempt to evade the issue. In our opinion the cases cited therein do not contradict appellants' position. The cases cited in appellants' opening brief cannot be thrown to the winds and disregarded by evasion or an attempt to fall back on technicalities. The Appellate Court by the New Rules of Federal Procedure and its own attitude has broadened the somewhat harsh rules which permitted cases to be dismissed upon pure technicalities and has made it possible to administer substantial justice.

The closing statement in appellee's brief shows the weakness of its position. We respectfully submit that even if the record were incomplete (which we strenuously

deny) under Rule 75, subdivision (h), the Appellate Court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the District Court. No demand by appellee for exhibits or letters which would presumably bear out the contentions made in the reply brief is shown by the record. Appellee had available the processes of the court to obtain access to any letters or other documents in the possession of, or under control of the appellants and appellee's council has made no such demand.

We refrain from lengthening this brief, except to comment that the surmises and conjectures of appellee have no place in a brief in this court and can avail nothing for they must be disregarded.

Respectfully submitted,

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